Date of Hearing: July 12, 2017

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT
David Chiu, Chair
SB 277 (Bradford) – As Amended May 9, 2017

SENATE VOTE: 22-15

SUBJECT: Land use: zoning regulations

SUMMARY: Authorizes the legislative body of a city or county to establish inclusionary housing requirements as a condition of the development of residential rental units. Specifically, **this bill**:

1) Allows the legislative body of a city or county to adopt an ordinance that requires, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower-income, very low-income, or extremely low-income households, as specified.

2) Requires the ordinance to provide alternative means of compliance, which may include, but are not limited to, in-lieu fees, land dedication, off-site construction, or acquisition and rehabilitation of existing units.

3) States that the Legislature finds and declares all of the following:

    a) Inclusionary housing ordinances have provided quality affordable housing to over 80,000 Californians, including the production of an estimated 30,000 units of affordable housing in the last decade alone;

    b) Since the 1970s, over 170 jurisdictions have enacted inclusionary housing ordinances to meet their affordable housing needs;

    c) While many of these local programs have been in place for decades, a 2009 appellate court decision has created uncertainty and confusion for local governments regarding the use of this tool to ensure the inclusion of affordable rental units in residential developments;

    d) It is the intent of the Legislature to reaffirm the authority of local jurisdictions to include in these inclusionary housing ordinances requirements related to the provision of rental units;

    e) The Legislature declares its intent in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 2 of this act, to supersede any holding or dicta in any court decision or opinion, to the extent that the decision or opinion conflicts with that subdivision;

    f) In no case is it the intent of the Legislature in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 2 of this act, to enlarge, diminish, or modify in any way the existing authority of local jurisdictions to establish, as a condition of

development, inclusionary housing requirements, beyond reaffirming their applicability to rental units;

g) This act does not modify or in any way change or affect the authority of local jurisdictions to require, as a condition of the development of residential units, that the development include a certain percentage of residential for-sale units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower-income, very low-income, or extremely low-income households; and,

h) It is the intent of the Legislature to reaffirm that existing law requires that the action of any legislative body of any city, county, or city and county to adopt a new inclusionary housing ordinance be taken openly and that their deliberations be conducted openly consistent with the requirements of the Ralph M. Brown Act.

EXISTING LAW:

1) Grants cities and counties the power to make and enforce within their limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

2) Declares the Legislature's intent to provide only a minimum of limitation with respect to zoning in order that counties and cities may exercise the maximum degree of control over local zoning matters.

3) Specifically authorizes the legislative body of any county or city to adopt ordinances that do any of the following:

   a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes;

   b) Regulate signs and billboards;

   c) Regulate all of the following:

      i) The location, height, bulk, number of stories, and size of buildings and structures;

      ii) The size and use of lots, yards, courts, and other open spaces;

      iii) The percentage of a lot that may be occupied by a building or structure; and,

      iv) The intensity of land use.

   d) Establish requirements for offstreet parking and loading;

   e) Establish and maintain building setback lines; and,

   f) Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.

4) Limits, pursuant to the Costa-Hawkins Rental Housing Act, the permissible scope of local rent control ordinances and generally gives the owner of residential real property the right to establish the initial rental rate for a dwelling or unit.

FISCAL EFFECT: None

COMMENTS:

Need for this bill: According to the author, "the increased cost of housing in California has created the displacement of low-income families and communities of color, in neighborhoods where they have traditionally resided. One of the tools used for increasing the number of affordable housing units is inclusionary zoning ordinances. Inclusionary zoning is a policy tool that requires or encourages private housing developers to include a certain percentage of income-restricted units within market rate residential developments. Since the 1970s, over 170 jurisdictions have enacted inclusionary housing ordinances to meet their affordable housing needs. However, a state appellate court decision (Palmer/Sixth Street Properties, L.P. v. City of Los Angeles) has created uncertainty and confusion for local governments regarding the use of this tool to require the inclusion of affordable rental units. State law must clarify and affirm the ability of local governments the option to require affordable rental housing in residential developments." This bill simply restores the authority of local governments to adopt inclusionary policies, which have been effective at creating affordable housing for the last forty years.

Background: California Constitution Article XI, Section 7, grants each city and county the power "to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." This is generally referred to as the police power of local governments. The Planning and Zoning Law is a general law that sets forth minimum standards for cities and counties to follow in land use regulation, but the law also establishes the Legislature's intent to "provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."

Using this police power, many cities and counties have adopted ordinances, commonly called "inclusionary zoning" or "inclusionary housing" ordinances, that require developers to ensure that a certain percentage of housing units in a new development be affordable to lower- income households. These ordinances vary widely in the percentage of affordable units required, the depth of affordability required, and the options through which a developer may choose to comply. Most, if not all, of such ordinances apply to both rental and ownership housing.

In 2009, in the case of *Palmer v. City of Los Angeles*, the Second District California Court of Appeal opined that the city's affordable housing requirements associated with a particular specific plan (which was similar to an inclusionary zoning ordinance), as it applied to rental housing, conflicted with and was preempted by a state law known as the Costa-Hawkins Rental Housing Act. The Costa-Hawkins Act limits the permissible scope of local rent control ordinances. Among its various provisions is the right for a rental housing owner generally to set the initial rent level at the start of a tenancy, even if the local rent control ordinance would otherwise limit rent levels across tenancies. This provision is known as vacancy decontrol because the rent level is temporarily decontrolled after a voluntary vacancy. The Act also gives rental housing owners the right to set the initial and all subsequent rental rates for a unit built after February 1, 1995. The court opined that "forcing Palmer to provide affordable housing

units at regulated rents in order to obtain project approval is clearly hostile to the right afforded under the Costa-Hawkins Act to establish the initial rental rate for a dwelling or unit."

The Legislature enacted the Costa-Hawkins Rental Housing Act in 1995 with the passage of AB 1164 (Hawkins), Chapter 331. The various analyses for this bill exclusively discuss rent control ordinances and do not once mention inclusionary zoning ordinances, of which approximately 64 existed in the state at that time. The Assembly concurrence analysis of AB 1164, which is very similar to the other analyses, states that the bill "establishes a comprehensive scheme to regulate local residential rent control." The analysis includes a table of jurisdictions that would be affected by the bill, and the table exclusively includes cities with rent control ordinances and does not include any cities that had inclusionary zoning ordinances affecting rental housing. The analysis also states, "Proponents view this bill as a moderate approach to overturn extreme vacancy control ordinances which unduly and unfairly interfere into the free market." The analysis further describes strict rent control ordinances as those that impose vacancy control and states, "Proponents contend that a statewide new construction exemption is necessary to encourage construction of much needed housing units, which is discouraged by strict local rent controls." This legislative history provides no indication that the Legislature intended to affect inclusionary zoning with the passage of AB 1164.

California Building Industry Association (CBIA) v. City of San Jose: The City of San Jose's inclusionary housing ordinance passed in 2010 and required all new residential development projects of 20 or more units to sell at least 15% of the for-sale units at a price that is affordable to low- or moderate-income households. The ordinance allowed developers to opt out of the 15% requirements by dedicating land elsewhere or by paying "in-lieu" fees to the City. Shortly before the ordinance took effect, CBIA filed a lawsuit in superior court, maintaining that the ordinance was invalid on its face on the ground that the city, in enacting the ordinance, failed to provide a sufficient evidentiary basis "to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributed to the development of new residential developments of 20 units or more and the new affordable housing exactions and conditions imposed on residential development by the Ordinance."

The superior court agreed with CBIA's contention and issued a judgment enjoining the City from enforcing the challenged ordinance. The Court of Appeal then reversed the superior court judgment, and concluded that the matter should be remanded to the trial court. CBIA then sought review of the Court of Appeal decision in the Supreme Court which granted review.

In June of 2015, the Supreme Court of California concluded that the Court of Appeal decision should be upheld, and that "contrary to CBIA's contention, the conditions the San Jose ordinance imposes upon future development do not impose 'exactions' upon the developers' property so as to bring into play the unconstitutional conditions doctrine under the takings clause of the federal or state Constitution." The ruling also noted that enforcing these limits to address a growing housing problem is "constitutionally legitimate" and cited the severe scarcity of affordable housing in California in its decision.

Staff comment: The *CBIA v. City of San Jose* case makes it clear that inclusionary housing policies in California can require the creation of affordable for-sale units, but *Palmer v. City of Los Angeles* created uncertainty on what is appropriate for rental developments. This bill ensures that local governments may apply inclusionary policies to both rental and for-sale housing

developments. It is important to note that SB 277 does not mandate anything. Local governments may choose to adopt inclusionary policies, as many cities and counties in California have done for decades.

This bill is identical to a bill that was introduced in the Assembly (see related legislation section below).

Arguments in support: Supporters contend that this bill will help preserve local control over housing policies, enabling local governments to meet their communities' needs. Supporters argue that inclusionary housing programs are an important tool in the production of affordable housing for working families, and create strong, diverse neighborhoods with a range of housing choices.

Arguments in opposition: Opponents contend that the bill does not "address the core issue which allows local governments to mandate unrestricted long-term price controls on privately owned and private financed residential rental properties without cost offsets."

Committee amendments:

The Committee may wish to consider the below amendments, which make the following changes:

1. Amends the intent language to provide that the intent of this bill is to supersede the holding and dicta of the *Palmer v. City of Los Angeles* case (rather than superseding any court decision or opinion) to the extent that the decision conflicts with a local government's authority to impose inclusionary housing ordinances.

2. Clarifies that, with the exception of superseding the *Palmer v. City of Los Angeles* case, it is not the intent of the Legislature to enlarge, diminish, or modify the existing rights of a residential property owner under the Costa-Hawkins Rental Housing Act or the Ellis Act.

3. Add a co-author.

The Committee amendments are as follows:

1. In the heading, below line 1, insert:

(Coauthor: Senator Beall)

2. On page 2, in line 18, strike out the first "any" and insert:

the

3. On page 2, in line 18, strike out "or" and insert:

and

4. On page 2, in line 18, strike out the second "any" and insert:

the

5. On page 2, in line 19, strike out the first "or opinion" and insert:

of Palmer/Sixth Street Properties, L.P. v. City of Los Angeles (2009) 175 Cal.App.4th 1396

6. On page 2, in line 19, strike out the second "or opinion"

7. On page 2, strike out line 20 and insert:

a local jurisdiction's authority to impose inclusionary housing ordinances pursuant to subdivision (g) of Section 65850 of the Government Code, as added pursuant to Section 2 of this act.

8. On page 2, below line 40, insert:

(i) Except as provided in subdivision (e), in no case is it the intent of the Legislature in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 2 of this act, to enlarge, diminish, or modify in any way the existing rights of an owner of residential real property under Sections 1954.50 to 1954.535, inclusive, of the Civil Code and Sections 7060 to 7060.7, inclusive, of the Government Code.

Related legislation:

AB 1505 (Bloom, 2017): Authorizes the legislative body of a city or county to establish inclusionary housing requirements as a condition of development. *This bill is pending on the Senate Floor*.

AB 2502 (Mullin, 2016): Would have authorized the legislative body of a city or county to establish inclusionary housing requirements as a condition of development. *This bill died on the Assembly Floor.*

AB 1229 (Atkins, 2013): Would have expressly authorized cities and counties to establish inclusionary housing requirements as a condition of development. The bill further declared the intent of the Legislature to supersede any holding or dicta in *Palmer v. City of Los Angeles* that conflicts with this authority. AB 1229 was vetoed with the message:

> "This bill would supersede the holding of *Palmer v. City of Los Angeles* and allow local governments to require inclusionary housing in new residential development projects. As Mayor of Oakland, I saw how difficult it can be to attract development to low and middle income communities. Requiring developers to include below-market units in their projects can exacerbate these challenges, even while not meaningfully increasing the amount of affordable housing in a given community. The California Supreme Court is currently considering when a city may insist on inclusionary housing in new developments. I would like the benefit of the Supreme Court's thinking before we make legislative adjustments in this area."

Double-referred: SB 277 is double-referred. It was heard in the Assembly Committee on Local Government and passed out on a vote of 5-2 on June 28, 2017.

REGISTERED SUPPORT / OPPOSITION:

Support

California Rural Legal Assistance Foundation

California State NAACP
City of Santa Monica
National Association of Social Workers, California Chapter
Non-Profit Housing Association of Northern California
Peace and Freedom Party of California
Western Center on Law and Poverty

Opposition

Apartment Association California Southern Cities
Apartment Association of Orange County
East Bay Rental Housing Association
GH Palmer Associates
North Valley Property Owners Association

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